

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BROADCAST MUSIC, INC., et al.,  
Plaintiff(s),  
v.  
SHABBY INC., et al.,  
Defendant(s).

No. C05-4658 BZ

**REPORT AND RECOMMENDATION ON  
PLAINTIFFS' MOTION FOR ENTRY  
DEFAULT JUDGMENT**

Plaintiffs have applied for entry of default judgment against defendants Shabby Inc. ("Shabby"), doing business as Bourbon Street Bar and Grill ("Bourbon Street"), and David R. Bentley. Defendants have not appeared in this action and did not otherwise respond to plaintiffs' application. As defendants have not consented to magistrate judge jurisdiction, the following is a report and recommendation for entry of default judgment.

Plaintiff Broadcast Music, Inc. ("BMI") is a "performing rights society" which has been granted the right to license the public performance rights of copyrighted musical compositions, including 19 copyrighted songs that are the

1 subject of this action (the "Copyrighted Music"), on behalf of  
2 the copyright owners. The other plaintiffs are the copyright  
3 owners of the Copyrighted Music. Judith Saffer, the Assistant  
4 General Counsel of BMI, has submitted a declaration in support  
5 of plaintiffs' motion for default judgment, in which she  
6 describes BMI's business. BMI grants to music users the right  
7 to publicly perform the Copyrighted Music through blanket  
8 license agreements. BMI is a non-profit organization,  
9 returning the license fees it collects as royalties to  
10 independent composers and music publishers, after deducting  
11 its costs and reasonable reserves. Saffer Decl. ¶ 3. Through  
12 agreements with composers and publishers, BMI is also the  
13 copyright owners' attorney-in-fact and authorized to prosecute  
14 copyright infringement actions. Id. ¶ 6.

15 Bourbon Street was in the past a party to a licensing  
16 agreement with BMI, but by letter dated September 14, 2004,  
17 BMI cancelled the agreement because of non-payment of fees  
18 totaling \$4,182.56. Stevens Decl., Exh. C. The letter  
19 advised defendants that "public performance of BMI copyright  
20 controlled music" would be without BMI's permission and "may  
21 subject [defendants] to substantial damages under the Federal  
22 Copyright Law." Id. BMI subsequently learned that Bourbon  
23 Street was still hosting public performances of the  
24 Copyrighted Music without a license or permission from the  
25 copyright owners. Stevens Decl. ¶ 4. BMI sent letters on  
26 October 4, 2004, October 18, 2004, March 22, 2005, March 30,  
27 2005, May 6, 2005 and July 20, 2005, repeatedly advising that  
28 defendants needed to purchase a license from BMI or that they

1 should cease all use of the Copyrighted Music. Defendants did  
2 not respond. BMI also called Bourbon Street 14 times and  
3 spoke to persons associated with the establishment's  
4 operations. Id. ¶ 9. Despite these efforts, defendants  
5 failed to enter into a licensing agreement with BMI and  
6 continued to perform or allow the Copyrighted Music to be  
7 performed. BMI hired Christopher K. Pisano to observe Bourbon  
8 Street on three different nights and write down the songs  
9 performed. Mr. Pisano's certified infringement reports detail  
10 the cover prices charged and the songs performed. Stevens  
11 Decl., Exh. B. On November 24, 2004, Mr. Pisano observed six  
12 BMI-licensed songs being publicly performed; on January 15,  
13 2005, he observed five songs; on February 17, 2005, he  
14 observed seven.<sup>1</sup>

15 On November 14, 2005, plaintiffs filed a complaint  
16 alleging federal copyright infringement based on defendants'  
17 unauthorized public performance of the Copyrighted Music. See  
18 Compl. ¶ 10. Plaintiffs allege that defendants publicly  
19 performed and/or caused the public performances of the  
20 Copyrighted Music without a license or permission despite  
21 repeated warnings that such performances constitute copyright  
22 infringement. Id. ¶¶ 15-16. Plaintiffs claim that they have  
23 suffered "great and incalculable damage." Id. ¶ 17.

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24  
25 <sup>1</sup> Plaintiffs have attached to their complaint a  
26 schedule listing information for the allegedly infringed 19  
27 copyrighted songs, including the writers, publishers, copyright  
28 registration numbers and dates of infringement for such songs.  
The exhibit lists one copyrighted song with a date of  
infringement of February 18, 2005, but the record does not  
corroborate this. The record includes Mr. Pisano's reports for  
only three nights, and February 18, 2005 is not one of them.

1 On November 21, 2005, plaintiffs effected service of  
2 process on defendant Bentley by leaving a copy of the summons  
3 and complaint for him at his dwelling or usual place of abode  
4 and subsequently mailing a copy. Plaintiffs similarly  
5 effected service of process on defendant Shabby on December 7,  
6 2005 by leaving a copy of the summons and complaint for the  
7 authorized agent at the business address and subsequently  
8 mailing a copy. Defendants failed to answer the complaint or  
9 otherwise defend the action. On February 6, 2006, upon  
10 plaintiffs' request, the Clerk of this court entered  
11 defendants' default under Rule 55(a). Plaintiffs now seek a  
12 default judgment, consisting of a permanent injunction,  
13 \$57,000 in statutory damages and \$4,558.55 in attorneys' fees  
14 and costs.

15 Pursuant to Rule 55(b)(2), the court, in its discretion,  
16 may enter a default judgment against a party against whom  
17 default has been entered. Eitel v. McCool, 782 F.2d 1470,  
18 1471 (9th Cir. 1986). Through the declaration of Karen Frank,  
19 who bases her statements on personal knowledge, plaintiffs  
20 have shown that defendants are not infants or incompetent  
21 persons or in military service.

22 By their default, defendants are deemed to have admitted  
23 the well-pleaded averments of the complaint except those as to  
24 amount of damages. See Fed. R. Civ. P. 8(d); TeleVideo  
25 Systems, Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir.  
26 1987) (stating that upon default, the factual allegations of  
27 the complaint will be taken as true); Geddes v. United  
28 Financial Group, 559 F.2d 557, 560 (9th Cir. 1977). Liability

1 having been established on default, the remaining issue on  
2 default judgment is the relief available to plaintiffs. See  
3 Mitch Leigh, et al. v. Demetrius Sakkaris and Mary Sakkaris,  
4 1982 WL 1262 at \* 2 (N.D. Cal. Jan. 17, 1982) ("The owner and  
5 operator of a place of public entertainment for profit is  
6 liable for permitting unlicensed use of musical compositions  
7 on his or her premises.").

8 Plaintiffs seek statutory damages in the sum of \$57,000  
9 under 17 U.S.C. § 504, which represents a total of \$3,000 for  
10 each of defendants' 19 acts of alleged infringement. An award  
11 of damages under 17 U.S.C. § 504 is within the discretion of  
12 the court.

13 Under 17 U.S.C. § 504, plaintiffs may recover between  
14 \$750 and \$30,000 per infringing work,<sup>2</sup> or in the case of  
15 willful infringement, up to \$150,000. 17 U.S.C. § 504(c). In  
16 determining an appropriate award of statutory damages, courts  
17 have considered factors such as: (1) "the expenses saved and  
18 the profits reaped;" (2) "the revenues lost by the plaintiff;"  
19 (3) "the value of the copyright;" (4) "the deterrent effect on  
20 others besides the defendant;" (5) "whether the defendant's  
21 conduct was innocent or willful;" (6) "whether a defendant has  
22 cooperated in providing particular records from which to  
23 assess the value of the infringing material produced;" and (7)  
24 "the potential for discouraging the defendant." Fitzgerald  
25 Pub. Co., Inc. v. Baylor Pub. Co., 807 F.2d 1110, 1117 (2nd  
26 Cir. 1986). See also Controversy Music v. Agonafer Shiferaw,

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27 <sup>2</sup> The court considers all the parts of a compilation or  
28 derivative work to constitute one work. 17 U.S.C. § 504(c)(1).

1 No. C-02-5254 (MJJ), 2003 WL 22048519 at \*2 (N.D. Cal. Jul. 7,  
2 2003) (listing as factors to be considered the expense saved by  
3 the defendant, profits reaped by the defendant, revenues lost  
4 to the plaintiff, willfulness of the infringement and the goal  
5 of discouraging wrongful conduct).

6 Although the amount of damages is within the court's  
7 discretion, the court must have a basis for its award. See  
8 Mirage Studios v. Yong, No. C-93-2684 (VRW), 1994 WL 184613 at  
9 \*2 (N.D. Cal. Apr. 22, 1994) (awarding the minimum statutory  
10 damages for copyright infringement instead of the requested  
11 \$10,000 because "the court is constrained only by the 'maxima  
12 and minima' provided in the statute and [plaintiff] has failed  
13 to provide a factual basis for its statutory damages  
14 request"). The statute does not provide guidelines in  
15 determining an award that would be considered just, so the  
16 court must consider certain factors to inform its discretion.

17 In this case, I find that plaintiffs are entitled to  
18 statutory damages, but in an amount less than they requested.  
19 Plaintiffs have provided the court with proof as to  
20 defendants' willfulness. Defendants' lack of response to  
21 plaintiffs' efforts to communicate suggests knowledge and  
22 notice of copyright infringement. See Broadcast Music, Inc.  
23 v. Colonial Foods, Inc., No. C-92-4253 (DLJ), 1993 WL 87808 at  
24 \* 2 (N.D. Cal. Mar. 17, 1993) ("Where defendants have ignored  
25 or disregarded notices of the need for licensing, willful  
26 infringement has been found."); Broadcast Music, Inc. v.  
27 DeGallo, Inc., 872 F.Supp. 167, 168 (D. N.J. 1995) (finding  
28 willful infringement when plaintiffs sent "numerous letters to

1 defendants informing them that they were violating the  
2 copyrights in plaintiffs' songs"). In addition, the fact that  
3 Bourbon Street defaulted on an existing licensing agreement  
4 supports the conclusion that defendants knew they were  
5 infringing.

6 Mr. Pisano's reports show that defendants were able to  
7 charge covers ranging from \$3.00 to \$20.00, and it is likely  
8 that performances of the Copyrighted Music contributed to  
9 this. Furthermore, while defendants reaped the benefits of  
10 their infringement in profits, they saved the expense of  
11 paying BMI for a license to publicly perform the Copyrighted  
12 Music. Mr. Stevens, the Assistant Vice-President of General  
13 Licensing, estimates the licensing fees to be \$1,180 for the  
14 period from October 1, 2004 through September 30, 2005 and  
15 \$1,930 for the current year, from January 1, 2006 through  
16 December 31, 2006. Stevens Decl. ¶ 15. Conversely,  
17 plaintiffs lost the opportunity to earn this amount.  
18 Plaintiffs are entitled to statutory damages, but they do not  
19 explain or justify their requested amount of \$3,000 per  
20 violation.

21 Courts in this context, where defendants infringed by  
22 providing a public venue for performers to play copyrighted  
23 musical works, focus on the lost licensing fees and apply a  
24 multiplier to discourage copyright infringement. The amount  
25 awarded should be sufficiently high so that defendants are  
26 punished and learn "that it costs less to obey the copyright  
27 laws than to violate them.'" DeGallo, 872 F.Supp. at 169  
28 (concluding that "in the narrow class of cases dealing with

1 willful, unauthorized, musical performances in public  
2 establishments, the damages awards range from two times the  
3 licensing fee to five times the licensing fee"). See also  
4 Broadcast Music, Inc. v. R Bar of Manhattan, Inc., 919 F.Supp.  
5 656 (S.D.N.Y. 1996) (reducing requested damages amount in a  
6 similar copyright infringement action from \$2,000 per song to  
7 \$1,500 per song, which sum would be approximately five times  
8 the license fees plus plaintiffs' investigative expenses).  
9 Here, the lost licensing fees total \$3,110 and applying a  
10 multiplier of five yields \$15,550. At plaintiffs' request I  
11 have taken judicial notice of a stipulated judgment in a  
12 prior lawsuit in this court between plaintiffs and Shabby in  
13 which Shabby admitted infringing plaintiffs' copyrights  
14 [docket # 26]. In light of this history additional damages  
15 are necessary for deterrence purposes and I recommend awarding  
16 plaintiffs a total of \$25,000 in statutory damages.

17 In addition to statutory damages, plaintiffs seek  
18 injunctive relief to prevent defendants from unlawfully  
19 performing, or causing to be performed, plaintiffs'  
20 Copyrighted Music. 17 U.S.C. § 502 provides for the issuance  
21 of an injunction to restrain the infringement of a copyright.  
22 Colonial Foods, 1993 WL 87808 at \* 2. Injunctive relief is  
23 appropriate in cases involving default. See, e.g., Jackson v.  
24 Sturkie, 255 F.Supp.2d 1096, 1103 (N.D. Cal. 2003).

25 Plaintiffs' application establishes that, absent a  
26 permanent injunction, defendants might continue to infringe  
27 plaintiffs' works. Not only did defendants continue to  
28 infringe after receiving numerous letters, defendants' lack of



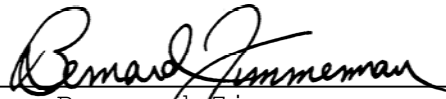
1 participation in this litigation has not given the court  
2 sufficient assurance to believe that they will refrain from  
3 future unauthorized use. See Jackson, 255 F.Supp.2d at 1103  
4 (finding that defaulting defendant's "past behavior and on-  
5 going ability to infringe on plaintiff's copyright constitute  
6 a continued threat of future infringing activity" sufficient  
7 to warrant a permanent injunction). I therefore recommend  
8 enjoining defendants, their agents, servants, employees and  
9 all persons acting under their permission and authority, and  
10 restraining them from infringing, in any manner, plaintiffs'  
11 Copyrighted Music.

12 Finally, plaintiffs seek reimbursement of their  
13 attorneys' fees and costs incurred in the prosecution of this  
14 action, under 17 U.S.C. § 505. "[T]he court in its discretion  
15 may allow the recovery of full costs by or against any party."  
16 17 U.S.C. § 505. See also Controversy Music, 2003 WL 22048519  
17 at \*3; Mirage Studios, 1994 WL 184613 at \* 2. Plaintiffs have  
18 submitted the declaration of Karen Frank, which details the  
19 time spent and hourly rates of the staff who have worked on  
20 this case. Plaintiffs' counsel spent 4.3 hours of her time,  
21 at a rate of \$375 per hour, and a paralegal spent 9.8 hours at  
22 a rate of \$175 per hour, researching, filing and serving the  
23 complaint, obtaining entry of default and pursuing this motion  
24 for default judgment. Frank Decl. ¶¶ 7-8. Plaintiffs have  
25 adequately supported their fees and hourly rates. Plaintiffs  
26 request \$1,231.05 in costs related to filing and service of  
27 process. Plaintiffs expended time and effort in pursuing this  
28 copyright infringement action. I find plaintiffs have

1 adequately documented their costs and established that their  
2 attorneys' fees were reasonable and necessary for plaintiffs  
3 to obtain a default judgment against elusive defendants.  
4 Therefore, I recommend awarding \$4,558.55 in attorneys' fees  
5 and costs.

6 For the reasons outlined above, I recommend awarding  
7 plaintiffs \$25,000 in statutory damages, granting an  
8 injunction against defendants and awarding plaintiffs  
9 \$4,558.55 in attorneys' fees and costs.

10 Dated: April 27, 2006

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12 Bernard Zimmerman  
United States Magistrate Judge

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